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ABSTRACT

The subject of collective bargaining negotiation impasse procedures in the public sector, which includes public school systems, is a broad one. In this speech, the author introduces the various procedures, explains how they are used, and lists their advantages and disadvantages. Procedures discussed are mediation, fact-finding, arbitration, advisory arbitration, med-arb (a contraction of the terms mediation and arbitration), and final offer arbitration. (MLF)

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PUBLIC SECTOR IMPASSE PROCEDURES

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(A speech delivered at the National School
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The subject of collective bargaining negotiation impasse procedures in the public sector, which includes our public school systems, is a broad one, and it is not possible to cover every facet involved in a limited period of time. Accordingly, I will try to "hit the high spots" by "walking you through" the various procedures that exist.

Before doing this, however, we might ask ourselves the question: why do we have such procedures in the public sector which, with the exception of mediation, are rarely utilized in the private sector? In the private sector, the parties bargain collectively, they resort to mediation, and if these fail to produce an agreement, a strike by the union and the use of counter-measures of economic self-help by the employer ultimately result in the resolution of the impasse. The possibility of a strike and employer counter-measures are integral parts of the collective bargaining process, without which there are no meaningful pressures to bargain. In the public sector, however, both federal and state laws, with a few exceptions, outlaw the strike weapon. What then, if not the economic pressure of the strike, is to serve in its stead as a means of resolving impasses and bringing about agreements in that sector? This is the function of impasse resolution procedures.

And what are these procedures? First, there is mediation. Put simply, mediation involves the use of an outside neutral who attempts to aid the parties in resolving their differences. A mediator has no powers of compulsion. His tools include only suggestion and persuasion. Typically, when the mediator appears on

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the scene, he will first hold a joint meeting with the parties. This is for the purpose of acquainting himself with the parties, of sizing up their attitudes, of identifying the items in dispute, and of ascertaining their respective positions on these issues. Once he has this information, he will meet separately with the parties for further, in-depth, discussions aimed at exploring possible areas of compromise. It is absolutely essential that the negotiators have trust in the mediator, and they must have confidence in him that he will not reveal their real positions to the other party. In the usual impasse situation, there will be a number of unresolved issues on the table, and the mediator will attempt, with due caution, to secure from the parties their real priorities concerning these items. Obviously, the parties will not have revealed their real priorities to each other at the bargaining table, and they will have some reluctance to do so to the mediator. Hopefully, however, they will help him in a little charade. The parties both know, as does the mediator, that while all demands are of equal importance, some are more important than others. The parties would do well at some stage of the game, by indirection or otherwise, and without commitment, to convey to the mediator some order of essentiality among the issues. This will enable him to put together a balanced compromise acceptable to both parties.

Using an oversimplified but useful example, how might a mediator bring about a compromise? Assume a school board negotiation with a union representing custodial and service employees in which, among other items, the union is demanding a liberalization in the employer's sick leave policy, a 30 per cent increase in the employer's contribution to the hospitalization insurance plan, and an additional paid holiday. At the bargaining table, the parties were at "dead center" on these issues, with the employer refusing to make any concessions and with the union remaining adamant in its position. On the one hand, there was pressure on both parties to consummate a total agreement, which meant making some concessions. On

the other hand, there was pressure to get the best possible contract which meant being a tough bargainer and securing concessions from the other side. Neither party was willing to offer a compromise since this would involve losing face as a hard bargainer, which is referred to as "image loss", or retreating from a firmly announced posture, which is called "position loss". Based on his private meetings with the employer's bargaining team, the mediator senses that the employer's concern with past abuses of sick leave is genuine, and that his attitude of "no retreat" on this demand is a "must" item. He also knows that the employer negotiators realize, based on their discussions with him concerning paid holidays and hospitalization insurance contributions, that the existing agreement is on the low side compared to other school board contracts. Since the mediator has also met privately with the union negotiating team, and has gotten "vibes" that the extra paid holiday and an improved hospitalization plan are high priority items, but that the sick leave liberalization plan demand is further down on the list, he is in a position to pose to the parties, in private, and with no commitment on their part, the following "what if's". To the employer, he will say: "What if I could get the union to withdraw its sick leave policy demand. Would you be willing to consider granting an extra holiday and increasing your contribution to the hospitalization plan by 15 per cent?" And, to the union he will say: "What if I could get the employer to agree to another paid holiday and a 15 per cent increase toward hospitalization insurance. Would you be willing to drop your demand for liberalizing the sick leave policy?" He will get both parties' approval to try on these "what if's" for size, it being clearly understood, and so stated, that the suggested compromise is entirely his own. Thus, there will be no "position loss" or "image loss" if his suggestion "does not fly." But if it is accepted, he will have achieved a compromise that the parties themselves were unable to reach at the bargaining table.

There are many other ways in which a mediator can assist the parties to come to terms such as his providing a forum for them to "blow-off steam"; his using his position to bring about a more thorough discussion of issues in a less emotion-charged atmosphere; his serving as a sounding board; his assisting in the defining and narrowing of issues; and, based on his knowledge of prevailing practices, his suggesting possible avenues of compromise that have not occurred to the parties.

Obviously, mediation works best where there are external pressures on the parties to enter into the process with a genuine desire to reach agreement. No one, even with mediation assistance, will compromise until he is willing to do so. In the private sector, it is not unusual for a mediator to adjourn further meetings with the parties until such time as a threatened strike or a stoppage already in progress has generated sufficient pressure so as to result in a more concessionary posture on the part of one or both of the parties. In the public sector, aside from extra-legal self-help activities that might occur, such pressure must come from political or public opinion sources, which may or may not be meaningful, and from the uncertainty of what happens next as concerns impasse procedures if agreement is not reached.

While mediation does not guarantee success, it is universally recognized as a useful tool. And, since it is essentially an extension of the collective bargaining process in which the mediator simply aids the parties in reaching their own agreements, it is a process that is to be encouraged.

What happens if mediation fails? In most jurisdictions, the next step is fact-finding. Under this procedure, a neutral third party holds a hearing at which each side is given the opportunity to present arguments in support of its position. This involves testimony, the submission of facts and statistics, and other relevant data concerning such criteria or standards as: (1) changes in the cost of living; (2) comparability with other similarly situated employers as concerns compensation,

fringe benefits, and other contractual terms; (3) changes in, and comparison of, employee productivity; and (4) ability or inability of the employer to pay increased labor costs. Obviously, both parties will be well-advised to do their "homework" before the proceeding commences. At the conclusion of the hearing, usually within thirty days, the fact-finder will submit a written report, most often with recommendations, to the parties and to the appropriate state labor relations administrative agency. The parties are then each free to accept or reject the recommendations, either in whole or in part.

The theory behind fact-finding is that recommendations from an impartial person, supported by such pressures as public opinion or political influence, will force the parties to abandon unreasonable positions and come to terms. Whether or not this will happen depends upon a number of circumstances. Most fact-finding reports are not widely distributed, and press coverage is usually quite sketchy. Such reports do not make for exciting reading, and evoke about as much interest in the average citizen as reading the scores of English cricket matches. Fact-finding works best when there is relatively equal bargaining power between the parties. Lacking this, there is the danger that the stronger party will reject recommendations, preferring instead to reach agreement based on bargaining strength. While these are weaknesses that are ever-present, and there is no guarantee of success, fact-finding, like mediation, is a useful and widely accepted impasse resolution procedure.

Much of the value of the fact-finding process is lost if it is viewed by the fact-finder as some sort of academic exercise designed to ascertain the equities of the parties' positions. Most informed opinion looks upon the fact-finder's role, not as one of discovering and recommending what he considers to be abstract justice, but rather of making recommendations that are sufficiently palatable that the parties would prefer to adopt them rather than have the dispute drag on.

Thus, the goal of any recommendations should not be equity but rather acceptability.

A fact-finder also misses the boat if he considers the purpose of fact-finding merely as the rendering of a report. It is a generally accepted proposition that a fact-finder should capitalize on every opportunity to don the hat of a mediator. Such opportunities may arise at several junctures, and for various reasons. As the parties face the transition from the purely conciliatory process of mediation to the adversary confrontation involved in a fact-finding hearing, they may well experience anxieties about the latter process. Such anxieties may provide the needed pressure to enable further mediation to succeed. Also, opportunities for mediation may develop during the course of the hearings. Facts are apt to be laid out more fully, leading one or the other of the parties to conclude that it would do well to minimize its losses through mediation. Also, uncertainty will likely develop concerning what the fact-finder will recommend, and what his rationale will be. This uncertainty could provide leverage in a mediation effort. It can sometimes be fruitful to attempt mediation after the hearings are concluded but before the report is rendered, with any compromises or agreement being included as recommendations in the report, thus making it easier for the parties to come to terms. Finally, the opportunity for further mediation after the report is submitted, based on the recommendations made, should be undertaken.

Next, the process of arbitration should be considered. Arbitration is the submission of a dispute to an outside neutral who holds a hearing and renders a decision that is final and binding on the parties. Arbitration may be used in either "rights" disputes or "interests" disputes. "Rights" disputes are those involving the interpretation or application of the terms of an existing agreement. Arbitration of such disputes is frequently referred to as "grievance arbitration". About 95 per cent of all agreements in the private sector, and most contracts in the public sector, specify binding arbitration as ^{the} terminal step of the grievance

procedure. A key point to bear in mind is that in grievance arbitration, the arbitrator performs a judicial function. He is limited to interpreting and applying the terms written by the parties. "Interest" disputes, on the other hand, these being what we are concerned with when we refer to impasse resolution procedures, are those involving the negotiation of an agreement. With a few exceptions, such as the Experimental Negotiating Agreement in steel, local transit companies, and a few airlines, binding arbitration of interests disputes is not used in the private sector. Where it is utilized, it is the result of voluntary agreement by the parties rather than being mandated by government. The latter, which we call "compulsory" arbitration, is not viewed favorably by either employers or union in the private sector. In the public sector, binding arbitration of interests disputes is limited almost exclusively to essential police and fire services.

At first glance, it might appear that binding arbitration of interests disputes is a civilized and fair method of settling such matters with finality. This, however, overlooks considerations that militate in the direction of a resounding "no" verdict for arbitration as an interests dispute resolution procedure, other than in essential government functions. Unlike a grievance arbitrator who performs a judicial role, that of the "interests" arbitrator is a legislative function. He decides what the parties shall put in their agreement. This is not case in the mold of freedom. There are also other criticisms. Parties who have an agreement "shoved down their throats" are not likely to implement that agreement in good faith. And, based on experience abroad, there is no guarantee that unions will abide by such decisions and not strike. By far the most telling argument against binding arbitration of interests disputes, however, is the very real likelihood that arbitration would become a substitute for genuine collective bargaining. The parties, not being trustful of each other's good faith and thus being concerned that the dispute will ultimately go to arbitration, and being aware of the propen-

sity of an interests arbitrator to "slice things down the middle", will plan their strategies, not to achieve agreement at the bargaining table, but to ensure that they are in the best possible position when they get to arbitration forum. This means conceding as little as possible in negotiations. As concerns the public sector, particularly, there are special problems. Governmental budgets, based on tax revenues, are highly complex and are fixed for a fiscal year. Woe be to the arbitrator who, lost in a complicated maze of figures and not having an army of CPA's to assist him, concludes that the governmental agency is hiding funds and thus awards more than the agency, which was actually not engaged in such shenanigans, can afford to pay. A related problem is that a government agency, if bound by an arbitrator's decision, may find its public priorities distorted as concerns how it will expend its limited resources. While it is an issue for the future, should collective bargaining, mediation and fact-finding fail effectively to resolve public sector impasses, many persons feel that with the exception of police and fire services, permitting public employees the right to strike would be a preferable alternative to compulsory arbitration.

Several other arbitration, or arbitration-related, procedures merit a brief explanation. Advisory arbitration, which has no counter-part in the private sector, and which would appear to be a contradiction in terms, is sometimes used in the public sector. Under this procedure, the arbitrator's decision is purely advisory to the governmental agency. While this is a personal viewpoint, advisory arbitration has no place in grievance disputes. And when applied to interests disputes, it amounts essentially to fact-finding with recommendations.

One also hears much these days about med-arb, which is a contraction of the terms mediation and arbitration. Under orthodox mediation, the mediator usually lacks muscle, and in conventional arbitration, the parties are fearful of putting their fate in the hands of an outside party. Under med-arb, the parties choose the mediator-arbitrator, and they must agree in advance that all decisions, whether

reached through negotiation, mediation or arbitration, become a part of the mediator-arbitrator's award which is final and binding. The mediator-arbitrator then meets with the parties in a negotiation or mediation setting at which time issues are discussed. The theory of med-arb is that because the parties know that in the end analysis, the mediator-arbitrator has the authority to issue a binding award, it keeps them honest in that they cannot resort to repetitious platitudes, bluff, or exaggeration in support of their positions because the mediator-arbitrator will see through this. Hopefully, then, they will be able to reach their own agreement on most issues.

Finally, a few words about final offer arbitration are in order. As indicated earlier, the principal weakness of conventional, binding arbitration of interests disputes is that the parties will hold back in negotiations and mediation in order to be in the best possible position at the arbitration hearing. Under final offer arbitration, each party is required to submit to the arbitrator its best and final positions on the issues in dispute. The arbitrator must then accept either the employer's or the union's final offer. He may not compromise between their positions on any given issue, and he may not award in favor of the employer on certain issues where he considers the employer's position more reasonable, and in favor of the union on certain other items where he considers its position to be the fairer of the two. In other words, he must accept either the whole package of one side or the other, the theory being that an unreasonable party will be "burned" when the other party's more sensible offer is accepted by the arbitrator. As a purely personal opinion, final offer arbitration is not likely to gain widespread acceptance. It has seemingly worked well in baseball negotiations between owners and players, where it has been used frequently. But in negotiations between players and club owners, there is only one issue in dispute, that being salary. Thus, if "Catfish" Hunter is too greedy and submits a final demand of \$150,000 per year, the club owner offers \$100,000 as his final offer, and the arbitrator, based on the arguments and statistics supplied to him, concludes that \$110,000 per year is the fairest

figure, he must, much to "Catfish's" chagrin, award him a salary of \$100,000. On the other hand, however, employer and union disputes involve numerous issues, and it makes no sense for the arbitrator to have to decide on an "all or nothing" basis which includes his acceptance of both reasonable and unreasonable positions as concerns individual items.

In closing, allow me to express my sincere hope that what I have said will provide grist for the discussion mill in our question and answer period.